



**Nganga (Suing as the personal representative of the Estate of the Late Joseph Karungu Ndinika) v Wanjiku (Environment & Land Case 57 of 2015) [2024] KEELC 3896 (KLR) (25 April 2024) (Judgment)**

Neutral citation: [2024] KEELC 3896 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 57 OF 2015**

**AA OMOLLO, J  
APRIL 25, 2024**

**BETWEEN**

**MUKUHI NGANGA (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF THE LATE JOSEPH KARUNGU NDINIKA) ..... PLAINTIFF**

**AND**

**MARY WANJIKU ..... DEFENDANT**

**JUDGMENT**

1. The Plaintiff filed this suit against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants vide a plaint dated 26<sup>th</sup> January 2015, which was amended on 11<sup>th</sup> March 2022 and further amended on 14<sup>th</sup> February 2023. By the latest amendment, the suit against the 1<sup>st</sup> and 2<sup>nd</sup> Defendant was withdrawn leaving only a claim against the 3<sup>rd</sup> Defendant. The Plaintiff seeks against the Defendant for the following orders;
  1. A declaration that the Plaintiff has a proprietary interest in the suit property in her personal capacity having been allocated Plot number 174.
  2. In the alternative, a declaration that the Plaintiff has a proprietary interest in the suit property having Jointly purchased it with the deceased.
  3. In the Further alternative, a declaration that the Plaintiff has a proprietary interest in the property as matrimonial property and has proved contribution  
That L.R. No. Block 3/189 is and always has been co-owned by the Plaintiff and thus her matrimonial home.
  4. A declaration that the Defendant was not a spouse/wife and thus not a widow of Joseph Ndinika Karungu -deceased and the 2<sup>nd</sup> Defendant's charge over LR No. Ruiru KIU Block 3/189 has been voided by the 2nd Defendant's breach of the terms of the guarantee.



5. A declaration that the Defendant is a trespasser in L.R. No. Ruiru KIU Block 3/189.
  6. An order directing the Defendant to forthwith vacate from L.R. No. Ruiru KIU Block 3/189 and in default an order allowing eviction of the Defendant therefrom.
  7. A permanent injunction restraining the Defendant whether by herself, her agents, servants and or nominees howsoever from remaining upon entering, occupying, residing on or otherwise claiming title or any interest whatsoever on L.R. No. Ruiru KIU Block 3/189 or a part thereof.
  8. Mesne profit of Kshs 1,550,000/= per year being rental income accruing from the suit property from the time of the deceased passing to date.
2. The Plaintiff pleaded that together with the deceased husband, they purchased plot numbers 167 and 174 from Kahawa Sukari Ltd sometime between the years 1987 and 1992 and the payment was made in various instalments. That plot number 167 was allocated to the deceased who unilaterally sold it and plot number 174 was allocated to her which they later developed as their matrimonial home. The said plot got registered as L.R. No. Ruiru KIU Block 3/189 hereinafter referred as “the suit property” but erroneously in the name of the deceased through the management of Kahawa Sukari Ltd.
  3. The Plaintiff stated that in 1998 they separated with the Deceased due to heavy drinking and abuse however they did not divorce until his demise on 12<sup>th</sup> October 2013. She added that in the suit property there was also a building which is used for commercial purposes as a hostel catering to students. That after the death of the deceased, the Defendant has been collecting income.
  4. The Plaintiff averred that the Defendant has been charging between Kshs.15,000 and Kshs.18,000 per bed per semester of 15 double-decker beds, which makes a total of 30 beds and that there are 5 private cubicles charged at Kshs.20,000 per room. She added that the Defendant resides in the detached servant’s quarters (DSQ) on the suit property which would fetch a monthly rent of Kshs.30,000. She therefore claimed for mesne profits of Kshs.1,550,000 per year since the death of the deceased on or about 12<sup>th</sup> October 2013 tabulated as follows;



Description	Amounts Per Semester	Amounts Per Month	Amounts Per Year
Average of Kshs.16,500/- per semester per bed for 15 double-decker beds (30 beds)	Kshs.495,000		
Kshs.20,000/- per private cubicle for 5 cubicles	Kshs.100,000		
Total per semester	Kshs.595,000		
Total per year (2 semesters in a year)			Kshs.1,190,000/-
Total (per year since the Deceased passed away)			Kshs.10,710,000/-

Description	Amounts per month	Amounts Per Year
Rent from DSQ per month	Kshs.30,000/-	Kshs.360,000/-
Total (per year since the Deceased passed away)		Kshs.3,240,000/-

Grand Total= Kshs.13,950,000

5. The Plaintiff further stated that around the month of November 2014, while trying to register a caution on the suit property, she became aware that the same was charged to Consolidated Bank of Kenya by the deceased as a guarantor to one John Karinge Ndinika to secure the sum of Kshs.2,500,000/=. She impleaded that the Defendant was brought to the suit property by the deceased and is thus occupying the same unlawfully, has no legal or equitable right on the property and is a mere trespasser.
6. That being a personal representative of the estate of the deceased husband, she has not granted possession of the suit property to the Defendant. Despite demand and notice of intention to being given, the Defendant has refused to act as demanded making the suit necessary.

### Defence

7. The Defendant filed a statement of defence dated 31<sup>st</sup> October 2017 and amended on 25<sup>th</sup> April 2023. She denied the Plaintiff's averments in the Plaint save that the suit property is charged to guarantee a borrowing by a third party. The Defendant contended that she had been living with the



deceased who is her late husband on the suit property and considered it her matrimonial home. She has denied the alleged commercialization of the suit property.

8. She added that the suit property is under the deceased name thus subject to the *law of Succession Act* which should be heard and determined in the Family Division of the High Court.

### **Evidence**

9. In support of her case, the Plaintiff testified as PW1 and adopted her witness statement dated 16/2/2023 as evidence in chief. She also produced documents contained in the list dated 8/10/20 and 26/1/2015 as exhibits PExh 1-6 and PExh 7-12 respectively. PW1 stated that sometime in 1987, they approached Kahawa Sukari Ltd to purchase a plot for their own development. That her deceased husband made payments for plot 167 while she paid for plot 174 which payments were made in instalments.
10. She continued that after the two plots were secured by her family, they now embarked on developing them and that they agreed to build their matrimonial home on the front plot (174) which is now the suit property. That she presented drawings to Kahawa Sukari Ltd which was approved and also hired Riflo Hardware to supply them with building materials. PW1 asserted that after completion of the building they moved in with their children. Unfortunately, after a lot of pressure and abuse from her husband, she opted out of the matrimonial home for her own safety. It is her evidence that she kept Kahawa Sukari Ltd on the loop on what was happening between them.
11. The Plaintiff averred that while they were living apart, instead of the title being released in her name, the title was released in the name of the deceased husband. She stated further that in 2014, she discovered the suit title was charged to Consolidated Bank Ltd guaranteeing his brother to secure a loan. She also learnt that the Defendant who was cohabiting with the deceased was living on the suit property and enjoying rental income from the structures they (plaintiff and the deceased) they had jointly put up. The Plaintiff stated that Kahawa Sukari Ltd has admitted to the errors and expressed their willingness to take corrective measures.
12. On cross examination, the Plaintiff confirmed that the suit property is registered in the name of the deceased and that when they parted ways, the property only had allotment letters where she had paid for the allotment of Plot No.167 and the suit property. She stated that she came to know that the title deed to the suit property was fraudulently registered under the deceased name after about 7 years after their separation and before his demise, she had reported the complaint to Kahawa Sukari.
13. Pw1 said she knew the Defendant because they were staying in the suit property where the house was partitioned to make it enough for operating as a hostel and that the Defendant was a worker. She also asserted that she had contributed to the construction of the building and that she had obtained ex parte orders from Ruiru to evict the Defendant from the suit property.
14. It is her further testimony that they separated with the deceased due to violence, and she was traumatised hence had a struggle to face him. That the allotment certificate for 174 was issued in her name and 167 in the deceased name and despite having notified Kahawa Sukari of her moving out, the deceased took to them a marriage certificate stating that they had agreed the titles to be under his name.
15. Edward Rurii Kanjabi testifying as PW2 said he is one of directors of Kahawa Sukari also testified adopting his witness statement dated 13/2/2023 as evidence in chief. He stated that he was a director at the time Plot 167 and the suit property were sold to the deceased and the Plaintiff respectively and that Plaintiff paid for the suit property separately. That the deceased brought a marriage certificate and



- ID card of the Plaintiff convincing them he be given title and since they did not know of their quarrels, they yielded to the request and gave him the suit title.
16. He testified further of receiving payment for the suit property from the Plaintiff and that he had found her buying construction materials for the building too. He stated that they received a complaint from the Plaintiff on the issuance of title to the deceased before he died but he did not admit liability as shown in letter dated 22/4/2020 which letter stated that they were sorry and that she should follow up with the husband.
  17. By an order of court issued on 27/7/2023, the Plaintiff filed a consolidated bundle of documents dated 17/10/2023 which included the following documents;
    - a. Ledger showing payments for plots 167 and 174
    - b. Allotment certificate dated 19/10/1987
    - c. Plaintiff's letter of 10/3/2020
    - d. Letters (\*2) dated 22/4/2020 from Kahawa Sukari Limited
    - e. Notice to vacate dated 20/3/2015
    - f. Copy of Limited Grant to the Plaintiff
    - g. Copy of official search dated 7/1/2014
    - h. Demand letter to John Karinge Ndinika
    - i. Demand letter to Mary Wanjiku
    - j. Demand letter to consolidated Bank Limited
    - k. Copy of Marriage Certificate
    - l. Allotment certificate for plot numbers 167\*174 Kahawa Sukari
    - m. Plot payment schedule for plot numbers 167\* 174 Kahawa Sukari
  18. The Defendant gave her evidence as DW1 and adopted her witness statement dated 31/10/2015 filed on 22/11/2017 as evidence in chief. She stated that the suit property is still charged to the bank. DW1 avers that she had lived on the suit property with the deceased as husband and wife without any disturbance from the Plaintiff. However, upon his demise the Plaintiff resurfaced claiming ownership of the same, incessantly harassing and trespassing on it with threats to evict her. She added that the Plaintiff has no registrable interest in the land and that she had since taken out letters of administration the estate of the deceased but did not produce the same.
  19. She stated that she had reported the Plaintiff on the numerous disturbances to the Kahawa Sukari Police station recorded as OB Number 32-20-3-2015. The Defendant confirmed that she has not pleaded in the amended defence whether she is the wife to the deceased but indicated in her witness statement and that she does not know the Plaintiff or whether the deceased was married. She stated that the deceased and his parents visited her parents where he stated that he was staying with her. DW1 did not have evidence of the visit but stated that she had children with him.

### **Submissions.**

20. The Plaintiff filed submissions dated 2/11/2023, supplementary submissions dated 10/11/2023 and further supplementary submissions dated 10/2/2024. The Defendant filed submissions dated



- 23/11/2023. The Plaintiff submitted that she had effectively demonstrated her substantial financial commitment to the suit property and that she not only initiated the purchase with the payment of the deposit but also diligently continued with subsequent payments until full settlement of the Purchase price as acknowledged by Kahawa Sukari Limited. That before the Plaintiff's separation from her late husband, she had commenced the construction of their matrimonial home on the said property, solidifying her integral role in the development of the suit property.
21. She added that registration of the suit property in the deceased name was a result of a mistake and irregularity made by the selling company, Kahawa Sukari Limited, which should be rectified in line with the provisions of Section 80 of the Land Registration Act, ultimately correcting the property's ownership to the Plaintiff's name. In support cited Judge L. Onguto in the case of *Mary Ruguru Njoroge v John Samuel Gachuma Mbugua & 4 others* [2014] eKLR.
  22. The Plaintiff submitted that she was married to the deceased and contributed to the purchase of the suit property thus as provided in Section 93 of the Land Registration Act, the same is deemed matrimonial property which is to be dealt with under the Matrimonial Property Act. She further submitted that Defendant has collected and continues to collect rental income from the suit property from the time of the deceased's passing until the present date. That the Plaintiff has suffered financial loss due to the Defendant's actions, and it is only just that she is compensated for the income wrongfully collected by the Defendant as mesne profit. In support of this claim, she cited the case of *Attorney General vs Halal Meat Products Limited* [2016] eKLR and *Rajan Shah T/A Rajan S. Shah & Partners v Bipin P. Shah* [2016] eKLR.
  23. The Plaintiff stated that the Defendant's claim that she was in a continued possession of the suit property asserts that she was the deceased wife, an issue not pleaded and no evidence to support the same and relied on the case of *World Explorers Safaris Limited v Cosmopolitan Travel Limited & another* [2021] eKLR and *D. T. Dobie & Company (K) Ltd v Wanyonyi Wafula Chebukati* [2014] eKLR.
  24. The Plaintiff in reliance to the case of *Zipporah Njoki Kangara v Rock and Pure Limited & 3 others* [2021] Eklr submitted that the main issue before court is about ownership of the suit property which falls squarely within the jurisdiction of this court and the determination as to whether or not the suit property is matrimonial does not oust the jurisdiction of this court. Further, that she sued the Defendant both in her personal capacity and as the personal representative of the Estate of the late Joseph Karinge Ndinika as evidenced by grant of letter of administration ad litem issued on 12<sup>th</sup> January 2015.
  25. In her Defendant's submissions, she urged the court to expunge the documents that the Plaintiff introduced in a filing of 17<sup>th</sup> October 2023 long after the hearing closed as they had not been produced and marked during trial from the record. The Defendant submitted that the Plaintiff brought this suit asserting a right in personam seeking a declaration of her proprietary interest in the land on the basis that she had proven contribution and also a declaration that she has proprietary interest in the land alongside the deceased being matrimonial property. That this court does not have jurisdiction to adjudicate the two matters thus has not been moved properly and the prayers sought cannot be granted. In support she cited ELC court at Thika in ELC Case No E012 of 2022, *Christopher Mathea Mukirai vs. Alice Njeri Muchugi* (unreported)
  26. She submitted that estate of the deceased was not represented in the matter as the Plaintiff is asserting her right and not on behalf of the estate. That she did not sue the estate and the estate is not represented since the suit impugns the deceased person's title. She also submitted that the Plaintiff who is claiming



proprietary stakes in the property of the deceased went ahead to take out letters of administration denying the estate the opportunity to participate and defend itself.

27. Further, she urges that the Plaintiff had not proved that the Defendant was a trespasser and relied on the case of *Pauline Mukuhi Ng'ang'a* (suing as the personal representative of the estate of the late Joseph Karungu Ndinika) V. *John Karinge Ndinika & 2 Others* [2017] eKLR where the Honourable Hon. Justice Mutungi observed as follows:

“That Plaintiff has also not placed any evidence before the court that the 3<sup>rd</sup> Defendant is a trespasser on the suit property. The 3<sup>rd</sup> Defendant has contended that she was living on the suit property with the deceased as his wife before his death. I don't think that the mere fact that the marriage between the deceased and the 3<sup>rd</sup> Defendant may be invalid renders the 3<sup>rd</sup> Defendant a trespasser on the suit property which she entered with the consent of the then registered owner.”

28. The Defendant submitted that Certificate of Lease was issued more than ten years before the demise of the proprietor of the suit property, and the Plaintiff did not challenge it until his demise. It is her contention that no proper explanation was issued as to why a suit was not instituted during the proprietor's life time. She cited Hon. Lady Justice Lucy. N. Mbugua in issuing a determination in *Joshua Ngatu v Jane Mpinda & 3 others* [2019] eKLR where she referred to Court of Appeal Case No.16 of 2012 Nairobi (Civil Application), which quoted Lord Selbourne L.C. delivering the opinion of the Privy Council in *The Lindsay Petroleum Co v Hurd* (1874) L.R. 5 P.C. 221, at page 240 thus:

“Now the doctrine of laches in Courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material....

29. The Defendant submitted that Plaintiff is not just guilty of laches but of coming to the seat of equity through short cuts and the back door such as obtaining ex parte order in Ruiru ELC Case No. 116 of 2020 to evict the Defendant. She also added that the Plaintiff has not shown monetary contribution towards the construction of the income-generating unit alleged and stated that she is not claiming ownership of the suit property and agrees that the same should be part of the Estate of the deceased.

### **Analysis and Determination:**

30. After considering the pleadings, the evidence tendered and the submissions filed by both parties; the first issue that arises that this court should determine as of first instance is its jurisdiction. The classic decision is the Court of Appeal in *Owners of Motor Vessel 'Lillian S' v. Caltex Oil (Kenya) Limited* [1989] KLR 1, bears the following passage (Nyarangi, JA at p.14):

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step.”

31. The matter involves an ownership dispute of the suit property in which Plaintiff has filed it as a representative of the estate of the late Joseph Karungu Ndinika, her late husband but seeks reliefs and



has led evidence on an individual/personal capacity rather than the estate. Article 162(2)(b) of *the Constitution* states that this Court shall have jurisdiction over disputes relating to the environment, the use and occupation of, and title to land. In addition, Section 13 of the *Environment and Land Court Act* expounds on the jurisdiction of this Court as follows:

- “(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
- (2) In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes—
- a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
  - b. relating to compulsory acquisition of land;
  - c. relating to land administration and management;
  - d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
  - e. any other dispute relating to environment and land.”

32. Thus, the crux of the dispute being that of title to land, it is obvious that this court has the jurisdiction to hear and conclusively determine the matter.

33. The next issue for determination is whether Pauline Mukuhi Nganga has interest on the suit property. I understand that the Plaintiff has brought the suit as a representative of the estate but the substance of the pleading filed, shows a representation in her own capacity seeking for interest in the suit property on the basis that the same was their matrimonial property and also on the basis that the same was allocated to her but the title was erroneously issued to the deceased.

34. In one dimension, Pauline Mukuhi Nganga is contesting for ownership of the suit property as against the estate of the deceased husband and on the other hand she is seeking for ownership of the estate as its representative from the Defendant. There is no way she would bring a suit against the deceased without the appointment of the administrator of her deceased husband. The Defendant did not take out letters of administration of the estate of the deceased neither did she mention to the court that she objected to the grant issued to Plaintiff.

35. The reliefs sought are against both the deceased and the Defendant and the law allows the Plaintiff to take out letters and still bring a claim for her own benefit where the suit land is registered in the name of the deceased. Her suit against the Defendant would have no standing in law without an administration of the deceased estate since the Defendant’s occupation and use is derived from the deceased.

36. In any event, JM. Mativo J, in the case of *Gitau v Kenya Methodist University (Kemu) (Petition 5 of 2020)* [2021] KEHC 322 (KLR) (8 December 2021) (Ruling) discussed in detail legal/procedural technicalities in litigation of matters in court as follows;

- “12. Talking about the overriding objective of the Rules and the requirement for courts to determine cases without undue regard to procedural technicalities,



it is important at this stage to attempt to define the term a “legal technicality.” This phrase has been defined as follows in 1616 Musembi Emmanuel Nzak, *Due Regard versus Undue Regard To Procedural Technicalities: The Civil Procedural Tug-Of-War Technicality*, citing Dictionary for US, <http://dict.us/technicality> accessed on 29 January 2016.

“Legal technicality” is a casual or colloquial phrase referring to a technical aspect of law and that it is not a term of art in the law, has no exact meaning and doesn’t have a legal definition. That notwithstanding, the term implies that strict adherence to the letter of the law prevents the spirit of the law from being enforced and is often simply used to denote any portion of the law that interferes with the outcome desired by the user of the term.”

13. The court in *James Mangeli Musoo v Ezeetec Limited* [2014] Eklr preferred the following definition:

“A technicality, to me is a provision of law or procedure that inhibits or limits the direction of pleadings, proceedings and even decisions on court matters. Undue regard to technicalities therefore means that the court should deal and direct itself without undue consideration of any laws, rules and procedures that are technical and or procedural in nature. It does not, from the onset or in any way, oust technicalities. It only emphasizes a situation where undue regard to these should not be had. This is more so where undue regard to technicalities would inhibit a just hearing, determination or conclusion of the issues in dispute.”

14. The House of Lords in *Henry JB Kendall & Others v Peter Hamilton* He111)1JB Kendall & Others v Peter Hamilton (1878) 4 AC 504. had this to say

“Procedure is but the machinery of the law after all, the channel and means whereby law is administered and justice reached. It strangely departs from its proper office when, in place of facilitating, it is permitted to obstruct, and even extinguish, legal rights, and is thus made to govern where it ought to sub serve”

15. In *Anchor Limited v Sports Kenya* [2017] Eklr the court while searching for a fitting definition of procedural technicalities had this to say:

“10. One workable and pragmatic definition of a technicality has been bequeathed to us by the Learned Honourable Justice Richard Mwongo, in *Kenya Ports Authority V Kenya Power & Lighting Co. Limited* (2012) eKLR and another one supplied by the Learned Hon. Justice C.W Githua in *James Muriithi Ngotho & 4 Others V Judicial Service Commission* (2012) eKLR: both decisions substantively say that procedural technicality is a lapse



in form that does not go to the root of the suit. In the former case, Justice Mwangi defined a technicality thus:

Combining the meanings of these words, “procedural technicalities” may be described as those that more concern the modes of proceedings and the rules involved that regulate formality and processes rather than substantive rights under law. This may not be an all-encompassing definition, but I think people generally associate procedural technicalities with annoying strictures and rules which hinder the achievement of substantial justice. An example would be citing a provision from a non-existent or wrong statute when the context is clear as to the statute intended.”

16. Whatever definition we adopt, courts are constitutionally obligated to adopt an approach which prefers determination of cases on merits as opposed to procedural technicalities. Simply put, to be preferred is an approach that places emphasis on merits as opposed to undue technicalities. Courts should critically examine the meaning of the “on the merits,” how the principle has permeated our procedural theory and architecture, courtesy of our transformative, liberal and progressive Constitution and why, despite the allure of the procedural rules, we should prefer the “determination on the merits” principle.
17. Perhaps, I should clarify that a resolution “on the merits” occurs when a lawsuit is decided according to procedural rules that (1) are designed, interpreted, and implemented to give the parties a full opportunity to participate in presenting the proofs and reasoned arguments on which a court can decide a case, and (2) do not systematically affect the outcomes of cases due to the intended operation of a principle other than the principle of allowing the parties a full opportunity to participate. A pertinent question as I see it raised in the instant application meriting determination by the Court of Appeal is whether the impugned order offends the “determination on merit principle” and the requirement to hear both parties. One thing is beyond argument, that is, the principle of resolving cases on their merits is now deeply ingrained in our Constitution. It’s now constitutional canon. It’s no longer a mere common law principle. Major aspects of the procedural laws both criminal and civil flow directly from the constitutional dogma that parties deserve a full opportunity to participate in shaping decisions about their claims and defenses. I am persuaded beyond peradventure that on this one ground alone, the Respondent’s intended appeal is not only arguable but it presents pertinent constitutional questions meriting determination by the Court of Appeal.
37. The technicality of the Plaintiff seeking for personal reliefs as opposed to those of the estate is more procedural than substantive. The merit of the case remain that she is seeking for interest in the suit property being the wife and the administrator of the estate of the deceased and having proven that she contributed to the purchase of the suit property being their matrimonial home. I will proceed



to determine whether or not the plaintiff has demonstrated an interest in the suit property and I am guided by the decision in *Odd Jobs vs Mubia* (1970) EA 476 CA which held thus;

“(1) a court may base its decision on an unpleaded issue if it appears from the course followed at the trial that the issue has been left to the court for decision.”

38. Section 107 to 109 of the *Evidence Act* provides:

“Burden of proof

107

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109. Proof of particular fact

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

39. It is not disputed that the suit property is registered under the deceased name. What is contested is how the same was acquired, in other words the root of the title. In the case of *Munyu Maina v Hiram Gathiha Maina*[2013]eKLR the Court of Appeal stated that:-

“... when a registered proprietor’s root of the title is under challenge, it is not sufficient to dangle the instruments of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which would not be noted in the register.”

40. The Plaintiff produced two lists of documents in her quest to prove her claim. She relied on the ledgers from Kahawa Sukari as evidence for the purchase of the suit property and mentioned that there is allotment letter for plot 174 bearing her name. The copies of ledgers certified by Kahawa Sukari Limited, and produced by the Plaintiff refer to payment for plots 167 and 174 issued to Joseph Karungu Ndinika and Pauline Mukuhi Karungu. The document shows on its face that the purchase price was Kshs 90000 which was settled in instalments with the final instalment paid on 29<sup>th</sup> September 1992.

41. Further, in document issued on 19<sup>th</sup> October 1987 by Kahawa Sukari Ltd and referred to as allotment certificate for plot 167 and 174 also bears the name of the deceased and the Plaintiff. It gave the amount payable as Kshs 110000 and the dates of payments as 19.10.1987; 28.9.1989 and 29. 9.1992. I have not seen any document produced to support the averment that plot 167 belonged to the deceased



while plot 174 belonged to her. The letter dated 22<sup>nd</sup> April 2020 drawn by PW2 indicated that plot 174 was paid for by the Plaintiff relies on the ledger that demonstrate joint purchase and nothing more. Consequently, it is my finding based on the evidence on record that the two plots were jointly purchased.

42. The Plaintiff also alleged that her deceased husband sold his plot 167 and proceeded to process title for plot 174 which currently is the suit title. From the documents produced, there is no evidence of that sale, not even the name of the person who bought is stated. This is noteworthy because the Plaintiff asserted that the plot was sold before their separation and since it was adjacent to plot 174, she was in a position to give us the details of the purchase. Secondly, there is nothing issued to them from Kahawa Sukari Ltd which gave the sizes of each of the plots to corroborate her evidence that plot 174 was measuring 0.09ha as shown on the face of the suit title Ruiru Kiu Block 3/189. For the Plaintiff to claim exclusive ownership of the suit title, she needed to discharge the burden of the issues I have raised but which she has failed to do.
43. However, the documents clearly speak that she participated in the purchase which then entitles her to a share. The Defendant contended that the suit property was registered in the deceased name on 1<sup>st</sup> June 1995, 19 years before filing of the suit thus the Plaintiff is guilty of laches and should not benefit from it. The Plaintiff explained the reasons why she moved away from the suit property and in cross-exam stated that she learnt the deceased had acquired registration of the suit title seven (7) years after their separation. In her witness statement, she indicated that she learnt of the fraud in 2014. Thus, the Plaintiff has led evidence on when she learnt of the impugned registration and no evidence has been presented by the Defendant who pleaded limitation of the action to contradict the Plaintiff.
44. Based on the documents produced, I am persuaded to find that the registration of the suit property in the name of deceased was for his benefit and the benefit of the plaintiff under the doctrine of constructive trust. Black's Law Dictionary 9<sup>th</sup> edition defines constructive trusts thus;

A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. (see Black's Law Dictionary) (Supra). It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see. Halsbury's Laws of England supra at para1453). As earlier stated, with constructive trusts, proof of parties' intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment...

45. In the case of Willy Kimutai Kitilit versus Michael Kibet (2018)eKLR where the Court of Appeal held thus; "... The respondent paid the last instalment of the purchase price in 2010. However, the appellant did not transfer the 2 acres to the respondent and instead caused the whole land to be registered in his name on 4<sup>th</sup> December, 2012, and filed a suit for the eviction of the respondent thereafter. By the time the appellant caused himself to be registered as the proprietor of the whole piece of land he was a constructive trustee for the respondent and it would be unjust and inequitable to allow the appellant to retain the 2 acres that he had sold to the respondent in the circumstances of the case."
46. In light of the foregoing analysis, I find that the Plaintiff is entitled to an equal share in the suit property.



47. Section 2 of the *Civil Procedure Act* Cap 21 of the laws of Kenya defines mesne profits as follows: -

“mesne profits”, in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession;

48. The Court of Appeal in the case of Attorney General v Halal Meat Products Limited [2016] eKLR considered when mesne profits could be awarded. The court stated as follows: -

“It follows therefore that where a person is wrongfully deprived of his property he/she is entitled to damages known as mesne profits for loss suffered as a result of the wrongful period of occupation of his/her property by another. See McGregor on Damages, 18thEd. para 34-42.”

49. For mesne profits to be awarded, the Plaintiff must specifically plead it and prove it. In this scenario, the Plaintiff pleaded for mesne profits with tabulation of the calculation but failed to produce any evidence in support thereof. Secondly, I find that if there is rental income receivable from the premises, the Plaintiff is entitled to receive 50% thereof pending subdivision of the suit title to take care of her interest and the subdivision shall be subject of the charge registered on the title.

50. Therefore, I enter judgement for the Plaintiff against the Defendant as follows;

- a. A declaration that the Plaintiff has proprietary interest in the suit property,
- b. A permanent injunction restraining the Defendant whether by herself, her agents, servants and or nominees howsoever from remaining upon entering, occupying, residing on or otherwise claiming title or any interest whatsoever on the suit property

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> APRIL 2024**

**A. OMOLLO**

**JUDGE**

